

STATE OF VERMONT

In re) Fair Hearing No. A-10/09-559
)
 Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Family Services Division, denying her request to expunge her name from the child protection registry. The issue is whether the Department abused its discretion when it denied petitioner's expungement request.

Procedural History

The parties held a telephone status conference on November 4, 2009 that was continued to November 30, 2009 because the attorney for the Department did not have the file. The Department's materials were sent to petitioner in advance of the November 30, 2009 status conference. Petitioner raised the question whether she had been properly notified of the underlying substantiation.

A telephone status conference was held on January 12, 2010 in which the Department presented a copy of the written Notice dated June 7, 2004 informing petitioner that she had been substantiated for abuse and could appeal the underlying decision. In terms of the expungement, petitioner was given

the opportunity to provide additional information to the Department.

The Department did not change its underlying decision to deny expungement. A telephone status conference was held on March 4, 2010 and a briefing schedule was set.

The decision is based on the record below and the parties' written arguments.

FINDINGS OF FACT

1. The petitioner is the mother of four children. Petitioner's interaction with the Department involves her three oldest children. The petitioner married in 2005 and has a two-year-old daughter with her husband who is not subject to any action by the Department.

2. The substantiation and subsequent court cases stem from incidents during 2004. Petitioner lived with her children; T.P. (daughter), A.P. (daughter), and K.P. (son). In 2004, T.P. was fifteen years old, A.P. was twelve years old and K.P. was six years old. The petitioner was fifteen years old when T.P. was born.

During spring 2004, petitioner separated from B.P., the father of K.P. Petitioner had lived with B.P. approximately eight years and he was a father figure for petitioner's

daughters. Household members experienced a great deal of stress over the break-up of petitioner and B.P.

A.P. was receiving specialized services from N.W., a Baird Center social worker, housed at the local school. The services were part of a Section 504 plan. A.P. presented challenging behaviors and was diagnosed with depression, ADD, and ODD. K.P. was diagnosed with ADHD.

3. The Department received a report on May 25, 2004 that was not accepted by the Department because there were no marks on the children regarding allegations of petitioner hitting and pushing her children, there was no risk of harm regarding allegations that the petitioner returned late to the home given the ages of the children, and, in terms of A.P.'s unmanageability, efforts were being made to access services.

Part of the report came from N.W. who recounted the petitioner coming to see her and telling N.W. what a hard time the petitioner was having coping. There was an admission by petitioner that there was a lot of yelling and it was starting to get physical. In terms of A.P., arrangements were made for her to stay with her grandmother temporarily.

Substantiation

4. The Department received a report on June 2, 2004 from the Essex Police Department regarding T.P. and K.P. The Department substantiated physical abuse of both T.P. and K.P. on June 7, 2004.

5. Corporal K.M. and Officer M.N. answered a call at the petitioner's residence on June 2, 2004. T.P. called the police for help.

6. In Officer N.M.'s affidavit, he indicated that T.P. and K.P. came out of the house. T.P. was visibly upset and crying. T.P. explained that she had an argument with the petitioner at Dunkin Donuts and the petitioner made her walk home. Officer N.M. went into the house while Corporal K.M. stayed to talk to the children.

He found petitioner on the telephone speaking to the Crisis Center. Petitioner corroborated that she had T.P. walk home from Dunkin Donuts. Petitioner then picked up K.P. and came home. Petitioner stated that when she returned home, she and T.P. argued and she admitted slapping T.P. on the face with an open hand and kicking T.P. on the leg.

Officer N.M. observed the redness on T.P.'s cheeks and saw a red and swollen mark on T.P.'s leg.

7. Corporal K.M. in his affidavit provides history because he first spoke to T.P. at her school on May 25, 2004 when she explained how petitioner hit her and K.P.

Corporal K.M.'s account corroborates Officer N.M.'s affidavit. He also observed T.P.'s red cheeks and bruise on her leg.

Corporal K.M. observed small brown bruises on K.P.'s arms between the wrists and elbow. K.P. told him the bruises were from his mom, the petitioner. K.P. also told him that when A.P. is home, she hits him causing bruising.

8. The officers arrested petitioner for domestic assault against T.P. Petitioner later pled guilty to the domestic assault and received a deferred sentence. Petitioner complied with the conditions of probation.

9. The Department assigned the case to D.E. He interviewed K.P. who he described as difficult to engage. K.P. showed D.E. his arms. D.E. saw bruises on each arm describing the bruises as circular like a dime and fading. K.P. answered that the bruises happened when he got out of bed.

D.E. interviewed petitioner who said A.P. and T.P. were unhappy with her because she obtained a Relief from Abuse Order against their stepfather.

D.E. interviewed N.W. who had been working with petitioner and her children for some time. N.W. indicated that she had not seen this type of behavior before. She said A.P. is difficult to parent. She was working with the family to access services.

D.E. recommended substantiation.

CHINS

10. On or about June 4, 2004, the Family Court placed A.P. and T.P. into foster care over the Department's objection that the children return to petitioner. K.P. was placed with his father, B.P.

11. The Family Court found both T.P. and K.P. children in need of supervision due to physical abuse by petitioner. The Family Court extended jurisdiction over A.P. as an unmanageable child.

12. On or about June 22, 2004, T.P. and A.P. were placed with petitioner although under the Department's custody. A.P. would later return to foster care.

13. The petitioner started individual counseling with P.M. prior to any intervention by the Department.

14. Through the Department's oversight, intensive services were put into place for the petitioner and her family. The petitioner continued with individual counseling

and used family services provided by Easter Seals. The children each had a counselor. A.P. continued with the Baird Center. Petitioner, T.P., and A.P. went to family counseling. Intensive Family Based Services (IFBS) were initiated for the family.

15. The record shows that petitioner initially engaged with the Department and service providers to deal with her parenting issues including discipline and anger.

16. The disposition hearing occurred on October 4, 2004. The Department retained custody. T.P.'s placement continued with petitioner. A.P. was in foster care. K.P.'s placement continued with B.P. Petitioner and B.P. were to work towards joint custody.

2005 Department/Petitioner interactions

17. In the beginning of 2005, relations between petitioner and T.P. deteriorated including a physical altercation. T.P. went to live with B.P. In addition, relations between petitioner and A.P. deteriorated including a physical altercation. A.P. went to live with B.P.

18. On or about March 28, 2005, petitioner e-mailed B.Z., Department supervisor, and N.W. Petitioner wrote:

At this point, I have pretty much given up, I no longer know what to do and I think if the kids don't want to be with me than other alternative need to be arranged.

Emotionally, I can not do much more, the counseling and Easter Seals, the Baird Center probation etc...Has depleted every emotion I have left, I love my children more than anything but my health and mental stability has been worse than a roller coaster ride, and I'm done...

I no longer want to participate in any services you are providing...

19. On or about April 1, 2005, the petitioner agreed at a team meeting that T.P. and A.P. should stay with B.P.

20. The Baird Center discharged the family from IFBS on or about April 1, 2005. Discharge recommendations included continuing individual counseling for T.P. and A.P. and continuing family therapy for petitioner, T.P. and A.P.

21. The petitioner married and moved to New Hampshire during 2006.

22. On or about November 25, 2005, the Department's Review Team recommended that the Department vacate custody of T.P. and A.P. to B.P. At that time, T.P. did not want any contact with petitioner, and A.P. wanted short and monitored contact with petitioner.

23. In terms of K.P., petitioner started a parentage action on or about August 17, 2004. Petitioner did not participate at the final hearing. On January 11, 2005, the Family Court awarded custody of K.P. to B.P.

Expungement

24. On May 27, 2009, the Department acknowledged receipt of petitioner's request for expungement.

25. Petitioner requested expungement after applying for a foster care license with her husband and being turned down due to the substantiation.

26. The petitioner indicated that despite feeling overwhelmed during 2005, she continued to want a relationship with her children. The petitioner and her husband returned to Vermont January 2006. Petitioner filed a motion for parent/child contact (visitation) on or about March 16, 2006. The case was dismissed on May 2, 2006 when the petitioner did not appear in court and B.P. told the Court that visits were occurring in counseling sessions.

27. The petitioner attempted to modify parental rights and responsibilities (custody) during 2007 and 2008 but her motions were denied. The first prong to a modification of custody is to show changed circumstances. This was not done so the Court did not inquire into the best interests of the children.

28. The petitioner sees A.P. and K.P. on a regular basis. The petitioner sees T.P. every now and then. T.P. is

an adult and lives independently. A.P. and K.P. live with B.P.

29. Petitioner's case for expungement was assigned to J.J., a registry reviewer.

30. Petitioner submitted a letter dated July 15, 2009 from her counselor P.M., a letter dated June 1, 2009 from her husband, and a note dated July 1, 2009 from A.P.

31. P.M. is a licensed clinical mental health counselor who has seen petitioner off and on since June 2004. P.M. noted that petitioner voluntarily sought help for herself and sought treatment for her children. P.M. noted that she was fully aware on the Department's involvement. P.M. wrote:

What I remember most about this period was [petitioner] fully complying with what DCF required, while...working full time, parenting, and managing her emotionally response to the most stressful experience of her life.

...She also continues to have ongoing involvement with her children who are no longer in her custody. Like good and loving parents everywhere [petitioner] is dedicated to meeting the emotional, social, developmental, and educational needs of her children. [petitioner] is also skilled at managing the sometimes challenging behaviors of her son who has ADHD.

Working with [petitioner] over this extended period of time allows me to state with confidence that she poses no risk to children. The clearest evidence of this is that [petitioner] parents a preschooler, an 11 year old, and a teenager. She accomplishes this by making clear and firm decisions regarding discipline and she has learned to minimize conflict by improving her communication and coping skills.

32. G.DaS. is petitioner's husband. They met in 2004 when petitioner was dealing with the Department and conflicts with B.P. According to G.DaS., petitioner was very stressed and not able to communicate with B.P. when he first met her. Petitioner returned to her counselor and improved. She returned to college and works.

He notes that K.P. comes every weekend to their home and that A.P. visits weekly. Petitioner speaks to her children on a daily basis. He writes she is a supportive parent. He has never seen petitioner act inappropriately with her children.

G.DaS. writes that petitioner realizes "she made a mistake" and that she regrets what happened.

33. A.P. wrote:

For the longest time as far back as I can remember my mother was very unhappy with how her life turned out. This showed because she was a very angry, short tempered person. I moved out of my mother's house when I was thirteen, it was best at the time. I am now seventeen and I have seen my mother grow these last four years. She has a lot more patience and is more understanding as a mother. She has a younger daughter...(my sister) who she is great with. I have seen her become a better person over time and grow into what I believe is a good mother.

34. Petitioner and her husband met with J.J. on July 20, 2009.

35. J.J. reached out to Department staff who worked on petitioner's case. B.Z. indicated in an e-mail dated September 24, 2009 that she could support the overturn of the substantiation. D.E. indicated in an e-mail dated September 3, 2009 that he wanted to discuss the case. There are no notes as to a discussion between D.E. and J.J.

36. On September 30, 2009, the Commissioner's Review was sent denying petitioner's request for expungement. J.J. and T.Z., Registry Review Unit Director signed the Commissioner's Review.

37. The pertinent parts of the analysis and decision in the Commissioner's Review state:

Your submissions from two family members speak positively about you. While a mental health clinician with whom you have worked for a number of years has spoken well of the work you have done in therapy, a number of concerns remain.

You admit to causing physical harm to TP, yet you deny ever abusing KP. ...While the DCF record indicates that you were engaged in the services provided to you and making progress towards the goal of reunification, the situation changed and all three children ended up living with BP, the girl's step-father. Eventually your contact with the children decreased due to your actions, as is evidenced in the record, and you stated "it was up to the girls" to contact you. ...Of note is your e-mail to the District dated 3/28/05...Full custody of TP, AP, and KP was awarded BP in 5/05. Despite your attempts to modify the courts custody orders in recent years, court records indicate that it has deemed it appropriate for you children to remain in the care of other providers since 2004.

38. The petitioner filed a timely request for fair hearing of the Commissioner's Review.

ORDER

The Department's decision is affirmed.

REASONS

The overarching purpose of the statutes governing reporting of child abuse is to protect children. 33 V.S.A. § 4911(1). The child protection registry is a tool that is used to further this purpose by providing certain employers and volunteer groups a means to check the suitability of individuals seeking employment or volunteer work with children.

Petitioner's decision to seek expungement is based on her desire to apply to be a foster parent and to be able to participate as a volunteer in children's activities.

The expungement process is governed by 33 V.S.A § 4916c. The applicable provisions are found in 33 V.S.A. § 4916c(b), which state:

The person shall have the burden of proving that a reasonable person would believe that he or she no longer presents a risk to the safety or well-being of children. Factors to be considered by the commissioner shall include:

(1) The nature of the substantiation that resulted in the person's name being placed on the registry.

(2) The number of substantiations, if more than one.

(3) The amount of time that has elapsed since the substantiation.

(4) The circumstances of the substantiation that would indicate whether a similar incident would be likely to occur.

(5) Any activities that would reflect upon the person's changed behavior or circumstances, such as therapy, employment or education.

(6) References that attest to the person's good moral character.

A person may appeal to the Human Service Board if the commissioner denies his/her request for expungement.

The Board's review is set out in 33 V.S.A. § 4916c(e), which states:

The person shall be prohibited from challenging his or her substantiation at hearing, and the sole issue before the board shall be whether the commissioner abused his or her discretion in denial of the petition for expungement. The hearing shall be on the record below, and determinations of credibility of witnesses made by the commissioner shall be given deference by the board.

The sole issue before the Board is whether the Department abused its discretion when they denied petitioner's request for expungement. The burden is on the petitioner to show that the Department abused its discretion.

Abuse of discretion arises when the decision is made for untenable reasons or the record has no reasonable basis for the decision. State v. Putnam, 164 Vt. 558, 561 (1996); USGen New England, Inc. v. Town of Rockingham, 177 Vt. 193 (2004). Abuse of discretion can extend to a failure to exercise authority. In Re: T.S., 144 Vt. 592, 593 (1984). If the Department has a reasonable basis for their decision, the Board must affirm the Department's decision, even in those situations, in which the Board or a trier of fact may have reached a different conclusion based on the information at hand.

The Department argues that they did not abuse their discretion because the reviewer relied on the failure to take responsibility for the finding of abuse to K.P., petitioner declining services in 2005, and the Family Court not changing custody.

The petitioner argues that the Department abused their discretion by taking information out of context from 2005 including the March 28, 2005 e-mail and by not giving proper weight to the actions she has taken in therapy and in maintaining a relationship with her children.

The crux stems from the Department's decision that petitioner is minimizing responsibility for the underlying

substantiation of physical abuse to K.P. and the Department's read of petitioner's actions during 2005. The Family Court custody proceedings are not germane because the Department misunderstands the Court's decision not to hear the modification requests on procedural grounds by concluding that the Family Court made a decision looking at the best interest of the children. See 15 V.S.A. § 668.

Although the Board may look at the underlying record and reach a different conclusion, the Board is limited to the Department's determinations of the record below including the Department's determination of the credibility given witness's description of past events. The Department cannot be said to have abused its discretion in determining that petitioner did not meet her burden of showing that she no longer presented a risk of harm to children when she did not take responsibility for the substantiation of physical abuse to K.P.

Accordingly, the Department's decision is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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